

Date: July 24, 1996
Case No.: 95-INA-00054

In the Matter of:

PIONEER BALLOON,
Employer

On Behalf of:

MIRKO BEKIC,
Alien

Appearance: Eliezer Kapuya, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

Richard E. Huddleston
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 1, 1993, Pioneer Balloon ("Employer") filed an application for labor certification to enable Mirko Bekic ("Alien") to fill the position of Computerized Audit Clerk/Bookkeeper at an hourly wage of \$10.20. The minimum experience required to perform this job was listed as two years in the job offered (AF 35-36). The job duties for the position are:

Will keep records of financial transactions for establishment, using calculator and computer. Summarizes details in separate ledgers or company files and transfer data to general ledger.

On March 11, 1994, the CO issued a Notice of Findings ("NOF") in which he concluded that the application for labor certification was deficient for two reasons (AF 31-33). First, the CO stated that the Employer's rejection of U.S. applicants was improper because the Employer failed to explain, with specificity, the lawful, job-related reasons for rejecting each U.S. worker in question, and give the job title of the person who considered them for employment. Second, because of discrepancies between information supplied by applicants and information supplied by the Employer, the CO requested that the Employer contact and interview these applicants and, if they are rejected, to set forth the job-related reasons for such rejection.

On April 11, 1994, the Employer submitted rebuttal in which it stated that only one of the four U.S. applicants responded to the request to interview (AF 21-30). The Employer then stated that this applicant did not have experience in all of the required job duties.

On April 19, 1994, the CO issued a Supplemental NOF, in which he stated that the

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Employer has listed job duties which do not appear in any single Dictionary of Occupational Titles job description and, therefore, requires the job holder to perform a combination of duties (AF 13-19). Because such a combination of duties is not considered to be customary and normal for one job position, the CO instructed the Employer to either revise the job duties and eliminate the combination of duties, establish that such employment is normal, or justify the combination of duties. In addition, the CO stated that if the Employer chooses to revise the job duties to eliminate the combination of duties, it must readvertise to retest the labor market. The CO further instructed that if the Employer decides to justify the combination of duties, it must establish a business necessity. In regard thereto, the CO set forth the requisite standards for establishing business necessity. Lastly, the CO stated that if the Employer wished to show that such a combination is normal or customary, it must submit documentation showing that the Employer has normally employed persons to perform this combination of duties and/or that workers customarily perform the combination of duties in the area of intended employment.

In this second NOF, the CO rejected the Employer's reason for concluding that the one applicant, interviewed in response to the first NOF, was unqualified for the position. The CO instructed the Employer to again contact and interview this applicant. The CO further stated that, should the Employer chose to amend the job description, it cannot use this additional recruitment effort as a reason to reject that applicant.

The Employer timely submitted rebuttal to the second NOF on May 26, 1994 (AF 9). On June 28, 1994, the CO issued a Final Determination, in which he concluded that the Employer failed to rebut the second NOF (AF 2-6). On July 5, 1994, the Employer requested review of that denial (AF 1). On November 7, 1994, the Employer submitted an appeal brief.

Discussion

If an employer's job description lists duties that do not appear in any single DOT job description, then the petitioned position requires a combination of duties. *H. Stern Jewelers, Inc.*, 88-INA-421 (May 23, 1990). If the required duties do appear under a single DOT job heading, or are related to or consistent with the job duties in the DOT, then the duties do not constitute a combination of duties for which customariness or business necessity must be established. *Robert L. Lippert Theatres*, 88-INA-433 (May 30, 1990). Under the regulations, a combination of duties is presumed to be an unduly restrictive requirement. See 20 C.F.R. § 656.21(b)(2)(ii). The presumption may be overcome if the employer demonstrates that:

1. It normally employs workers to perform that combination of duties;
- B.
 1. Workers customarily perform that combination of duties in the area of intended employment; or,
- C.

1. The combination of duties is based on a business necessity.

In the case at hand, the Employer disputes that a combination of duties is, in fact, required for this position. The Employer raises two arguments in rebuttal. First, it argues that it is the local employment office that created the appearance of a combination of duties.

In its brief, the Employer argues as follows:

The CO in his denial is stating the job title is important and many BALCA decision [sic] held that the content of the job is what is the substance. Irregardless what a job name is, does the work candidate is able to do the job is what it counts. Here

what it also makes it unfair is the job title 'Bookkeeper/Audit Clerk,' was named by the E.D.D. specialist who is the C.O. agent. [Sic].

Please review the employment Development Department correspondence with the employer. The E.D.D. called the job as Bookkeeper/Audit Clerk, we do not see why the CO has to undo what his agent decreed. [Sic].

A review of the evidence in this case fails to support the Employer's argument. The Employer's application for alien employment certification listed two titles for the position, "Computerized Audit Clerk/Bookkeeper." The proposed advertisement was revised, as indicated by the Employer, to read "bookkeeper/computerized audit clerk." This fact does not support the Employer's contention that it was the E.D.D. office that created the appearance of a combination of duties. The Employer presented the position with a dual title and, in fact, by listing the computerized audit clerk component first, emphasized that part of the job as important. If the advertisement had been run as submitted by the Employer, it would have been listed under the computerized audit clerk section of the classified section and not under bookkeeping. The Employer has failed to establish that it was the local job office that created the appearance of a combination of duties.

The Employer concluded that because none of the duties relate to an "audit clerk," this job does not constitute a combination of duties and it does not, therefore, need to rebut the presumption.

The Employer's remaining argument is that the job is really that of a bookkeeper and cites the DOT job description in support thereof. The Employer argues that the title of the position should not be a determinative factor and that in the advertisement, the audit clerk job "in fact only exists in a blurry way next to bookkeeping." In rebuttal to the second NOF, the Employer argues that the advertisement, entitled "**Bookkeeper/Computerized** Audit Clerk," ran under the heading of a bookkeeper and that "all of the people who applied for the job were interested in the bookkeeping job and not in the audit clerk job which in fact only exists in a blurry way next to bookkeeping."

Notwithstanding the fact that the advertisement only ran under the heading of "Bookkeeper" because it was changed by the local job office, the Employer's argument is clearly contraindicated by its own words and actions. In regard to the qualifications of applicant Jorge Rivas-Plata, the Employer stated in its rebuttal to the first NOF that this applicant was rejected because he never worked with a general ledger or had any experience in working as an audit clerk as called for in the job (AF 21). In the rebuttal to the second NOF, the Employer stated that he was rejected for not having experience in general ledger work (AF 9). However, in its brief, the Employer again stated that the applicant was rejected, at least in part, for not possessing the duties of an audit clerk. The position does, therefore, contain a combination of

duties, even if the Employer failed to detail them in the job description. Therefore, the combination of duties constitutes an unduly restrictive requirement. Because the Employer has failed to submit any argument or evidence to overcome the presumption, the application for labor certification must be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the August 22, 2002 for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.